Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1570

FREDDIE D. ROBINSON, *et al.*,

Petitioners,

v.

UNION CARBIDE CORPORATION,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR NOT GRANTING THE WRIT	5
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases:

Causey v. Ford Motor Company, 516 F.2d 416 (5th Cir. 1975) 9

Griggs v. Duke Power Co., 401 U.S. 424 10

Hazelwood School District v. United States, ____ U.S. ____ (June 27, 1977) 14

Hester v. Southern Railway Co., 497 F.2d 1374 (5th Cir. 1974) 10,11,13,14

International Brotherhood of Teamsters v. United States, ____ U.S. ____ (May 31, 1977) 12,13

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) 11

Jones v. Tri-County Electrical Cooperative, 512 F.2d 1 (5th Cir. 1976) 15

Ochoa v. Monsanto Co., 473 F.2d 318 (5th Cir. 1973) 10,11

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 10,12,13

Smith v. Delta Airlines, 486 F.2d 512 (5th Cir. 1973) 5

Terrell v. Feldstein Co., 468 F.2d 910 (5th Cir. 1972) 5

United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971) 10

Statutes:

Federal Rules of Civil Procedure 52(a) 5

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Respondent Union Carbide Corporation prays that a writ of certiorari not issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

When the findings of fact of the trial court are adequately supported by the evidence in the record and were not induced by an erroneous view of the law, should they be set aside?

Should statistical data received as evidence in a civil rights case be closely scrutinized by the court?

STATEMENT OF THE CASE

This case was filed as a class action in the United States District Court for the Southern District of Alabama alleging violations of the Civil Rights Acts. The plaintiffs were black employees of the defendant, Union Carbide Corporation, (hereinafter called Union Carbide) at its Mobile County, Alabama, plant or unsuccessful black applicants for employment. This plant began operations in 1965 and is a high technology plant that manufacturers a product that strains or filters liquid or gaseous molecules.

During 1973 this plant employed approximately 314 people. Approximately 180 of these were hourly employees with the remaining 134 being salaried. Of the 134 salaried employees 71 were engineers or technicians. Approximately 26 percent of the hourly employees were black while the number of black or other minorities in the Mobile area work force was approximately the same.

During the period 1965 through 1969 Union Carbide hired 37 black employees and 166 white employees, while during the period 1970 through 1973 it hired 47 black employees and 93 white employees. Union Carbide had black and other minorities employed in the following salaried positions: production foremen, employee relations assistant, plant accountant, quality control shift leader, quality control technician, quality control analyst, junior instrument technician, engineer, buyer, production clerk, stenographer and clerk typist. There was only one member of a minority group employed as an engineer by Union Carbide although a concerted effort had been made by it to obtain applicants without success. The hourly jobs at the plant were in the areas of production, maintenance and warehousing with the great majority of the hourly employees being classified as chemical operators in production. These chemical operators operate, regulate and control chemical processing equipment.

Blacks were also employed in maintenance as maintenance mechanics, oilers, helper trades and stores attendants and in warehousing as warehousemen.

All hourly jobs were filled on a seniority bid basis with the skilled maintenance jobs requiring demonstration of the skill involved. Production jobs were worked on a rotating shift basis. Union Carbide accepted applications for employment at all times whether or not vacancies currently existed and had an actively implemented affirmative action program for seeking, hiring, training and promoting minority citizens.

The substance of the petitioners' contentions against Union Carbide revolve around alleged hiring and promoting discrimination.

The parties in their pleadings and by the pretrial order in the district court defined the following triable issues:

1. Were Cynthia Caldwell and Ronald Coleman denied employment by the defendant on account of unlawful racially discriminatory hiring policies?

2. Do the defendant hiring policies and practices have a racially discriminatory impact on blacks? If so, can any or all of these policies and practices be justified by business necessity?

3. Do the defendant promotion policies and practices have a racially discriminatory impact on blacks? If so, can any or all of these policies and practices be justified by business necessity?

4. Were Freddie Robinson, Thomas Austin, Willie Jones, Oleny Lucious, Willie J. Mickles, Peter Reese, Jerome Fitts, and Paul Richardson denied promotions on account of unlawful racially discriminatory policies and practices?

5. If proved, do the facts herein agreed upon and contested constitute violations of the rights of plaintiffs and the class they represent under Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866.

Union Carbide contended that its employment record spoke for itself. Twenty-six percent of the hourly employees were black while the Mobile area black work force was approximately the same. There was no substantial disparity between the percentages of black employees of Union Carbide and blacks in the labor force. Approximately 31 percent of

the employees hired by Union Carbide since 1970 have been black.

Union Carbide contended that it had promoted and hired blacks and other minorities into foremen, personnel, accounting, purchasing, stenographic, clerical, quality control, engineering and instrumentation salaried jobs and was implementing its adoptive affirmative action program and actively seeking blacks and other minorities for engineering and technical jobs. Union Carbide contended that promotion procedures did not depend upon the subjective recommendation of an employee's immediate supervisor but required a diversified input of names and applications for the vacancy.

After extensive discovery, a pretrial conference was held wherein the questions to be determined by the hearing were delineated. Though these triable issues were reduced to said five in number, the main point advanced throughout the entire course of this litigation, both in arguments on motions, in conference, and upon the trial itself, was the expressed desire of the petitioners' counsel, through the aegis of this class action, to establish a new requirement of law, to become applicable nationwide, relative to the hiring practices of industry as they deal with minority employment problems; viz, whether or not the rule established, or fastly becoming so, that industry must demonstrate a ratio of minority to majority employees commensurate with that in the labor market available, failing in which there is prima facie discrimination, is the appropirate rule, or whether or not the better rule would be that the employment ratios must equal the application ratios. Translated to the case at hand, it was argued that where it is shown that as to the hourly rate employees 26 percent were black and 74 percent were white, closely paralleling the work force ratio in the Mobile area, there was invidious discrimination being practiced by the employer because the application ratio was more nearly 50-50, and unless the employment practices were or are such as to accomplish this ratio in employment, it is prima facie that the employer is practicing racial discrimination.

REASONS FOR NOT GRANTING THE WRIT

I.

FINDINGS OF FACT IN TITLE VII CASES ARE REVIEWED IN THE SAME MANNER AS ANY OTHER TRIAL COURT FINDINGS: THEY SHOULD NOT BE SET ASIDE UNLESS SUCH FINDINGS ARE CLEARLY ERRONEOUS.

The United States Court of Appeals for the Fifth Circuit is committed to the proposition that findings of fact in Title VII cases are reviewed in the same manner as any other trial court findings: they will not be set aside unless it is concluded that such findings are clearly erroneous. See *Smith v. Delta Airlines*, 486 F.2d 512 (5th Cir. 1973); *Terrell v. Feldstein Co.*, 468 F.2d 910 (5th Cir. 1972); *Fed. R. Civ. P. 52(a)*.

In the present case the litigants proposed separate methods to analyze the hiring data. The petitioners suggested that the total number of applications by black persons is the critical factor to be considered. Their statistical analysis purported to show that blacks file approximately 50 percent of all applications but secured only 26 percent of new hourly positions. Witnesses, however, cast suspicion on the reliability of petitioners' approach, comparing it to "trying" to measure jellyfish with a rubber band [because] you don't know where all the applicants come from . . . [and] how many are duplicated. [S]ome applicants fill six applications a year out. We have even had three or four in one month from a particular applicant." Further, the petitioners offer the testimony and charts compiled by witness Ardura in order to establish that the applicant population at Union Carbide's plant was approximately 50 percent black for the years 1972 and 1973 whereas Union Carbide hired only 34 percent black in 1972 and 21 percent black in 1973. Mr. Ardura testified as follows: that he counted names on applicant flow charts that also noted race; that the flow charts were Union Carbide

business records kept for E.E.O.C. reporting purposes; that in 1962 he determined there were 2,361 applicants with 1,095 being black and 961 being white and 304 unknown; that in 1973 he determined there were 1,809 applicants, 889 black, 804 white and 116 unknown; that the race of a substantial number of applicants during 1972 and 1973 was unknown from looking at the available business records of Union Carbide; and that the plaintiffs' attorney and an employee of Union Carbide attempted to identify the race of a substantial number of applicants that he then placed in his black-white categories. Mr. Ardura testified as follows:

"Q And so I don't misunderstand you, and I don't mean to belabor this, you did not include those applicants who had applied prior to 1972, but were still considered in the active file?

A Correct.

Q And in your numbers, you don't consider what jobs were being applied for by these active applicants?

A Correct.

Q Now, in your raw data of your composite of all applications, I believe you testified, and your statistics show, that you had a substantial number of applicants whose race was unknown?

A Correct.

Q Now, would you explain to the Court, Mr. Ardura, how you handled, from a mechanical standpoint, your determination of an applicant, when you got his name and you went to the flow sheet, and there was no one or two there, there was nothing there, what would be your mechanical process of either putting him in black, white or leaving him in unknown?

A I would ask Mr. James Blacksher or Mr. Carl Inge as to whether or not they would be able to identify this certain person as to either being black or white.

Q Now, did you do that for each one of those?

A Yes.

Q Would you ask both Mr. Blacksher and Mr. Inge on each of the unknowns?

A Yes.

Q And it is your testimony that you transferred some of the unknowns into either the black, white category based on what Mr. Inge told you or what Mr. Blacksher told you?

A That's correct.

Q And then this number - - - if you would, look at your Exhibit there. Do you have that?

A Which Exhibit?

Q #10.

A Okay.

Q On the first page, part one of number ten, in your category, unknown, was a number of three hundred and four.

A Correct.

Q That is the number left after you had transferred some out of that category pursuant to the individual knowledge of Mr. Blacksher or Mr. Inge?

A That is correct.

Q Did Mr. Blacksher or Mr. Inge tell you on what basis they were giving you this information about whether these people were black or white?

A They informed me that you could determine it somehow by the schools that they attended.

THE COURT:

Let me interrupt you a moment. Did you make your computations on the basis of the known race that you were able to determine from the information supplied? Did you ever make that computation, and also make it after adjusting the race by view of what was told you?

A It was made from the composite information of both.

THE COURT:

In other words, you never did make it separate?

A No.

THE COURT:

So, you do not have any figures that would reflect what the actual records show?

A Right.

THE COURT:

Go ahead.

MR. McALISTER:

Q And that same proposition and statement, Mr. Ardura, would hold true, not only for 1972, but for 1973?

A That is correct.

Q And it would hold true for your figures as far as so-called composite applicants and then those contained in the active file, would it not?

A Correct.

Q So, part of your statistical information is based on what you were able to determine from the records out at Union Carbide, and part of it was determined from what Mr. Inge or Mr. Blacksher told you?

A Correct.

Q And you don't know what part is represented by either of those?

A *No, I couldn't say that.*"

In view of the basis of the statistics the trial court stated that "I will say this; on the basis of the evidence before the Court at this time, statistical value of the Exhibits is greatly weakened."

Also, as support for its statistical premise the plaintiffs offered in evidence through witness Ardura the number of persons hired by Union Carbide in 1972 from 1972 applicants and the number of persons hired by Union Carbide in 1973 from 1973 applicants. The plaintiffs' statistics did not count applicants who had applied in prior years but who were hired in 1972 and did not include prior years applicants hired in 1973. For instance, if a black application was filed in December of 1971 and the person was hired in January 1972,

he was not counted as being hired. From aught that appears from the plaintiffs' statistics there were numerous black hires from prior years applications that were not counted. How about the years 1971 when 58 percent of the new hires were black, 1970 when 35 percent of the new hires were black, and 1972 when 34 percent of the new hires were black? Obviously such statistical evidence should be closely scrutinized due to the applicant complexities and the variables involved.

Union Carbide, offering an alternate method of analysis, urged that the employment record should be proportionate to the composition of the local work force. Since 1970 approximately 33 percent of all employees hired by Union Carbide have been black. Operating its plant in an area where the labor force is approximately 26 percent black, Union Carbide presented convincing statistics. Adopting Union Carbide's method of analysis, the district court concluded that the employer has provided truly equal access to the jobs at its plant by blacks and whites and found that this has in fact produced an employee population with substantially the same proportion of blacks as are represented in the Mobile area work force.

The district court and the court of appeals recognized that Union Carbide's method of analysis in this case was more reliable and that petitioners' analysis was subject to suspect data, such as duplication of employment applications and miscalculation of applications reviewed. Under the standard of review in the Fifth Circuit there must be "requisite subsidiary facts to undergird the ultimate facts." *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975). The court of appeals concluded that the record in this case presented sufficient underpinnings to support the ultimate findings that Union Carbide did not engage in discriminatory hiring practices. When the findings of fact of the trial court are adequately supported by the evidence in the record and were not induced by an erroneous view of the law, they should not be set aside.

Also the Fifth Circuit has cautioned that complexities and variables require close scrutiny of empirical proof in civil rights cases. *Pettway v. American Cast Iron Pipe Co.*, supra, p. 231, and *Hester v. Southern Railway Co.*, 497 F.2d 1374 (5th Cir. 1974).

Further, the Fifth Circuit has stated that the smallness of the numbers involved in the statistics in a civil rights case demonstrates that the trial court is not compelled to follow such statistical showing to set in motion the usual presumptions or to make a finding or preference thereon. *Ochoa v. Monsanto Co.*, 473 F.2d 318 (5th Cir. 1973)

Title 42 U.S.C., Section 2000e-2(j) reads:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section, or other area."

This principle was definitely expressed by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424. In a passage which the Fifth Circuit has referred to as "what may be the last word on this issue" *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, the Supreme Court stated:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." (401 U.S. at 430-431)

To employ any group at a rate that greatly exceeds that group's composition of the work force in the community is to give discriminatory preference in violation of Title VII of the Civil Rights Act of 1964.

Let's examine the evidence offered by petitioners to support their thesis; that is, the hires of Union Carbide should be in proportion to the applicant population. Further, let's be mindful of the admonition of the court in *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) that complexities and variables involved in statistical proof require close scrutiny by the trial court; and the warning of the court in *Hester v. Southern Railway Co.*, supra, that the improper interpretation of statistics may mislead a court's attempt to investigate the existence of discrimination; and the observance of the court in *Ochoa v. Monsanto Co.*, supra, that the smallness of the numbers does not compel a trial court to allow statistics to set in motion a presumptive train.

In this case, the petitioners upon realizing that they could not establish a prima facie case when faced with the employment statistics and area population ratio undertook a new tack; applicant ratio to employment ratio. The facts were: (a) area population of 26 percent black; (b) employment by Union Carbide from 1965-1969 of 37 blacks and 166 whites, 18 percent black; (c) employment by Union Carbide in 1970 of 5 blacks and 9 whites, 35 percent black; (d) employment by Union Carbide in 1971 of 10 blacks and 7 whites, 58 percent black; (e) employment by Union Carbide in 1972 of 25 blacks and 48 whites, 34 percent black; (f) employment by Union Carbide in 1973 of 19 blacks and 68 whites, 21 percent black.

In following this course of applicant ratio to employment ratio the petitioners developed difficulties in two basic areas:

their statistical evidence was faulty and the applicable law did not support their basic premise.

The petitioners' argument also fails to take into consideration the following material facts: the job being applied for by an applicant, the sex, age, size, health and prior work experience of an applicant. All of these factors made the statistical data extremely weak and lacking in substantial probative weight. Further, the applicant ratio is a constantly changing and flexible situation subject to all of the indefiniteness of applicant motivations and qualifications including the possibility of manipulation. The Mobile area work force is a fixed, determinable and recognized grouping and a plant work force with a black-white ratio nearly approximating the area work force with no evidence being presented of any deliberate design toward that end strongly suggests, almost conclusively, that the employer is not discriminating in its hiring procedures. *International Brotherhood of Teamsters v. United States,* ____ U.S. ____ (May 31, 1977)

Therefore, we contend that the petitioners' statistical case failed under close scrutiny. The U.S. Court of Appeals for the Fifth Circuit held in an exhaustive opinion in *Pettway v. American Cast Iron Pipe Co.,* supra, as follows: "The courts have based a finding of adverse impact on data showing the percentages of blacks and whites hired as compared to the percentages of each in the available population. The statistical disparity is held to create a prima facie showing of discriminatory impact and thus invokes a requirement that the job relatedness of the overall selection process should be established." p. 225

Also, this is the requirement of the United States government. The federal regulations implementing the equal opportunity requirements for governmental contracts provide as follows:

> "In determining whether minorities are being under utilized in any job classification the contractor will consider at least all of the following factors: (1) the minority population of the labor area surrounding the facility . . . ." 41 C.F.R. §60-2.11(a)(1)(i) and
>
> "The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables the contractor should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in §60-2.11." 41 C.F.R. §60-2.12(a)

Union Carbide has provided truly equal access to the jobs at its Mobile plant for blacks and whites and its plant work force with a black-white ratio nearly approximating the area work force is obviously not discriminating against its applicants for employment as a class. Nondiscrimination in its purest form is so revealed. *International Brotherhood of Teamsters v. United States,* supra. This is not to say that such an employer could not discriminate against an individual job applicant applying for a particular job. But discrimination to a class is nonexistent in such evidentiary circumstances. The Fifth Circuit recognized this difference in *Pettway v. American Cast Iron Pipe Co.,* supra, and *Hester v. Southern Railway Co.,* supra. Pettway was a class action seeking class relief with all the elements of Rule 23 of Fed. R. Civ. P. present; numbers, common question, typical claims and adequate representation. The proof by the plaintiffs in that type of case is classic as heretofore related. There is a discernible correlation between the class and the statistics, between the employees and the area population. The area population is a fixed and recognized grouping. However, once you leave the everspreading all encompassing area population and reduced this side of the equation to the applicants for employment at a particular plant the equation no longer balances because said applicants begin to attain personalities and characteristics that did not exist in the nameless, faceless

area mass. See *Hazelwood School District v. United States*, ____ U.S. ____ (June 27, 1977). It becomes imperative to know something about the applicant: sex, size, age, health and experience; and more importantly, what jobs are open and what jobs are being applied for and is the applicant qualified for the job. Therefore, *applicant ratio should not equal plant employee ratio*, unless it also represents the area ratio.

The Fifth Circuit clearly stated in *Hester v. Southern Railway Co.*, supra, as follows: "Moreover, comparison with general population statistics is of questionable value when we are considering positions for which, as here, the general population is not presumptively qualified" (p. 1379). Also, see *Hazelwood School District v. United States*, supra. The Fifth Circuit held in that case that "The most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of blacks among those applying for a particular position and the percentage of blacks among those hired for the position" (p. 1379). In that case plaintiff Hester was presenting her own individual discrimination claim as an applicant. The class aspect of the suit had been eliminated. It was imperative for her to prove the disparity between the percentage of blacks among those *applying for a particular position* and the percentage of blacks among those *hired for the position* in order to show discrimination. Her proof in the trial court had been statistical evidence of area population race ratios vs. the number of black-white employees in a particular job at Southern Railway Company. She had equated apples to orchids. In spite of this the trial court found discrimination. However, the Fifth Circuit reversed the trial court and held that comparison with general population statistics is of questionable value when you are considering a position for which the general population is not presumptively qualified. Hence, the requirement that the relevant proof would be to compare the percentage of blacks among the applicants for a particular job and the percentage of blacks hired for the job.

In the case of *Jones v. Tri-County Electrical Cooperative*, 512 F.2d 1 (5th Cir. 1976) an argument similar to the petitioners in this case was made by the employer. The employer contended and the district court found that between January 1971 and September 1973 there were 23 black applicants of whom 8 were hired. In the same time period 159 whites applied, of whom 35 were hired. Thus, the district court pointed out that 24 percent of all the applicants were hired; 34 percent of the black applicants and 22 percent of the white applicants. In view of these applicant-hire percentages, the district court concluded there was no racial discrimination. However, the Fifth Circuit reversed the district court and held as follows:

> "The statistics which the Courts have always considered is the racial composition of the employer's work force as compared to the percentage of the minority population in the employer's service area." p. 2

In conclusion, we say that the law does not support the petitioners contention in this case. If the applicant statistics are to be meaningful, you must look to the particular jobs being applied for and the blacks among those hired for the positions. The petitioners failed to establish a prima facie case of hiring discrimination under the evidence and the law. The trial court's findings of fact and conclusions of law were properly based and duly affirmed by the court of appeals.

CONCLUSION

For the foregoing reasons respondent prays that a writ of certiorari not issue to review the opinion and judgment of the court of appeals.

Respectfully submitted,

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July 25, 1977

CERTIFICATE OF SERVICE

I hereby certify that the foregoing response to petition for writ of certiorari has been served on Messrs. Jack Greenberg, James M. Nabbit, III, Melvyn R. Leventhal and J.U. Blacksher, attorneys of record for petitioners, by mailing a copy of said response to each of them, postage prepaid and properly addressed.

This the 25th day of July, 1977.

VINCENT McALISTER

Of Counsel for Respondent